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October 24, 2005

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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**Federal Communications Commission
Office of Secretary**

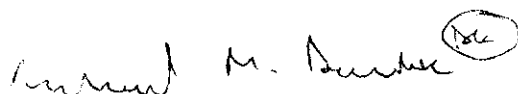
Re: Joint Motion for Limited Stay, WC Docket Nos. 05-196 and 04-36

Dear Ms. Dortch:

Pursuant to Sections 1.43 and 1.44(e) of the Commission's rules of practice and procedure, please find enclosed an original and 4 copies of the request of Nuvio Corp., Lightyear Network Solutions, LLC, Lingo Inc., and i2 Telecom International, Inc. for a stay pending appeal of the Commission's *First Report and Order*, FCC 05-116, in the above captioned dockets.

Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Richard M. Rindler

Counsel for Nuvio Corp., Lightyear Network Solutions, LLC, Lingo Inc., and i2 Telecom International, Inc.

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
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IP-Enabled Services)	WC Docket No. 04-36
)	
E911 Requirements for IP-Enabled Service Providers)	WC Docket No. 05-196
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OCT 24 2005

Federal Communications Commission
Office of Secretary

MOTION FOR PARTIAL STAY

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International, Inc.

SUMMARY

Movants respectfully request that the Commission stay sections 9.5(b) and (c) of the rules adopted in this docket, which require interconnected VoIP providers to supply E911 service by November 28, at any location that a user might register, regardless of whether it is technically or operationally feasible to do so. Each Movant offers a nomadic VoIP service and allows customers to use non-native telephone numbers. Movants' customers can register an address anywhere in the country and Movants would have to provide E911 service to that address.

The Movants meet the Commission's criteria for granting a partial stay. The Movants are likely to succeed on appeal because the *Order's* 120 day requirement is arbitrary and capricious, runs counter to evidence in the record, and is inconsistent with the Commission's past decisions regarding implementation of E911 capabilities by other service providers. The Movants will suffer irreparable harm by being forced to disconnect large numbers of their customers, up to 90% in some cases. Further, the balance of harms and public interest both favor a stay, since enforcement of the rules would put customers at risk by disconnecting their telephone service.

It is simply impossible for providers of nomadic services to comply fully with the Commission's VoIP E911 requirements within 120 days, and indeed may be impossible ever for them to comply on a nationwide basis. The Commission adopted unrealistic requirements despite uncontested evidence in the record demonstrating the practical, technical, and economic obstacles to full E911 deployment. The Commission's action in this docket stands in stark, and unexplained, contrast to its more measured and careful implementation of E911 obligations for PBX users, wireless carriers, and other nascent services. There is, therefore, a substantial legal argument for overturning the rules on appeal.

Movants have made their best efforts to overcome the obstacles and to comply with the November 28 deadline. These attempts, however, have merely confirmed the impossibility of the goals set in the *Order*. The only way for companies like Movants to obtain fast, widespread interconnection to the Wireline E911 Network was through third party vendors. No vendor's solution offered full compliance with the *Order*. Either they do not offer to perform all the functions required to comply with the rules, or they do not provide complete nationwide coverage. Movants' vendors say they expect to have an E911 solution in compliance with the *Order* by November 28 in most markets within the top 20 Metropolitan Statistical Areas ("MSAs") of the United States. This covers only 10% of i2's customers and 12% of Lightyear's customers in the United States. Moreover, no vendor will contractually commit that its solution will conform with the *Order* in any market at any time. According to one leading vendor, some parts of the United States will likely never be covered.

Absent a stay, Movants will be legally prohibited from continuing to serve the vast majority of their customers as of November 28. This is despite the fact that, since adoption of the *Order*, each VoIP provider has taken extensive steps to notify consumers of the limitations on their 911 service, giving consumers ample opportunity to switch to other services if they wished. Movants will be irreparably harmed by being forced to disconnect customers who want to continue using their services. This action will irreparably tarnish these companies' reputations and good will. Indeed, it is doubtful whether companies who are forced to disconnect up to 90% of their customers in one fell swoop will even be able to remain in business long enough to find out whether their court appeal is successful. A stay is therefore essential to prevent irreparable harm.

Staying the *Order* will not substantially harm other parties; rather, enforcement of the *Order* would create a greater risk of harm to the public by depriving large numbers of customers

of all access to the telephone network for some period of time. Virtually all VoIP customers have acknowledged they are aware of the E911 limitations associated with the Movants' service, so the risk of harm to them is now considerably less than the Commission believed it to be at the time of the *Order*. Further, widespread and abrupt disruption of telephone services would not serve the public interest.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	
E911 Requirements for IP-Enabled Service Providers)	WC Docket No. 05-196
)	

MOTION FOR PARTIAL STAY

Nuvio Corporation, Lightyear Network Solutions, LLC, Lingo Inc., and i2 Telecom International, Inc. ("Movants"), pursuant to sections 1.43 and 1.44(e) of the Commission's rules of practice and procedure,¹ hereby request a stay, pending appeal, of portions of the rules adopted in the *First Report and Order* in the above-captioned docket.² In support of this Motion, Movants submit the attached Declarations of Jason Talley ("Talley Decl."), Ravindra Bhatia ("Bhatia Decl."), James R. Rose ("Rose Decl."), and John J. Greive ("Grieve Decl.").³

Movants fully support the Commission's goal of protecting public safety, but respectfully submit that some of the means towards that end chosen by the Commission in the *Order* are unreasonable, arbitrary, and technically infeasible. Therefore, although Movants have each begun and will continue extensive efforts to comply insofar as possible with the Commission's requirements, they urgently request that the Commission stay sections 9.5(b) and (c) of the rules, which require interconnected VoIP providers ("IVPs") to supply E911 service by November 28,

¹ 47 C.F.R. §§ 1.43 and 1.44(e).

² *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking 20 FCC Rcd. 10245 (2005) ("*Order*").

³ Each of the Movants has petitioned for judicial review of the *Order* in the United States Court of Appeals for the District of Columbia Circuit. Movants advise the Commission that if the requested stay has not been granted by October 31, 2005, they intend to petition the court for a stay.

at any location that a user might register, regardless of whether it is technically or operationally feasible to do so.

STATEMENT OF FACTS

The Commission issued a *Notice of Proposed Rulemaking* (“Notice” or “NPRM”) to address the “potential applicability” of the 911 and E911 requirement to VoIP and IP enabled Services.⁴ The limited *Notice* made no tentative conclusions regarding the Commission’s intent to impose an E911 requirement on IP enabled services, noting that it did “not presume at this point that direct regulation would be required.”⁵ The Commission then adopted the *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers Order* (“Order”) on May 19, 2005.⁶

By the effective date of the *Order*, providers of “interconnected two way VoIP Service (“IVPs”) must: 1) “specifically advise every subscriber, both new and existing, prominently and in plain language, of the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service;”⁷ 2) “obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory;”⁸ and 3) distribute to all existing and new subscribers “warning stickers and other appropriate labels” stating that E911 service “may be limited or not available.”⁹ Each of the Movants has undertaken a significant effort to comply with the *Order*. Movants have revised their subscription process, modi-

⁴ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 ¶ 52 (2004), (“*IP Enabled NPRM*”).

⁵ *Id.* ¶ 56.

⁶ The text of the *Order* was released on June 3, 2005 and published in the Federal Register on June 29, 2005. The *Order* took effect 30 days from publication in the Federal Register (July 29).

⁷ *Order* at ¶ 48.

⁸ *Id.*

⁹ *Id.*

fied their terms of service, engaged in a massive customer education campaign, and obtained affirmative acknowledgements from the vast majority of their customers.¹⁰ Movants have also filed reports with the Commission concerning their progress in obtaining affirmative acknowledgements from their customers.¹¹

Within 120 days after the effective date (by November 28), all IVPs must: 1) “as a condition of providing that service to a consumer,” provide that consumer with E911 service as required by the *Order*;¹² (2) “transmit all 911 calls, as well as ANI [Automatic Number Identification] and the caller’s Registered Location for each call, to the PSAP, designated statewide default answering point, or appropriate local emergency authority that serves the caller’s Registered Location ...;”¹³ 3) route “[a]ll 911 calls ... through the use of ANI and, if necessary, pseudo-ANI, via the dedicated Wireline E911 Network”;¹⁴ (4) make the Registered Location “available to the appropriate PSAP, designated statewide default answering point, or appropriate local emergency authority from or through the appropriate automatic location information (ALI) database;”¹⁵ (5) “[o]btain from each customer, prior to the initiation of service, the physical location at which the service will first be utilized; (6) “[p]rovide ... end users one or more methods of

¹⁰ Rose Decl. ¶¶ 10-14, Grieve Decl. ¶¶ 10-14, Talley Decl. ¶¶ 15-24, Bhatia Decl. ¶¶ 17-27.

¹¹ See *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, Subscriber Notification and Acknowledgement Status and Compliance Reports filed by i2 Telecom International, Inc., (Aug. 10, 2005, Sept. 1, 2005, and Sept. 22, 2005); by Lightyear Network Solutions, LLC (Aug. 10, 2005, Sept. 1, 2005, and Sept. 22, 2005); by Lingo, Inc. (Aug. 10, 2005, Sept. 1, 2005, and Sept. 22, 2005); and by Nuvio Corporation (Aug. 10, 2005, Sept. 1, 2005, and Sept. 22, 2005).

¹² *Id.* at ¶ 47.

¹³ *Id.* App. B at 47, to be codified at 47 C.F.R. § 9.5(b)(2).

¹⁴ *Id.* ANI is defined as “Automatic Number Identification.” Pseudo Automatic Number Identification (“Pseudo-ANI”) means “[a] number, consisting of the same number of digits as ANI, that is not a North American Numbering Plan telephone directory number and may be used in place of an ANI to convey special meaning. The special meaning assigned to the pseudo-ANI is determined by agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.”

¹⁵ *Id.* App. B at 47, to be codified at 47 C.F.R. § 9.5(b)(4).

updating their Registered Location ... [which] must allow an end user to update the Registered Location at will and in a timely manner”; and (7) “submit a letter to the Commission detailing ... compliance with [the 120-day requirements].”¹⁶

Each of the Movants offers an “interconnected VoIP service” as defined in the *Order*. Although some VoIP offerings resemble the telephone service provided by traditional circuit-switched network operators, there are fundamental differences, as the Commission recognized in the *Vonage Preemption Order*.¹⁷ First, VoIP customers can only access the service via broadband Internet connections, usually cable modem or DSL access technologies. Movants’ customers purchase special dedicated-use computers (Multimedia Terminal Adapters or “MTAs”) that plug directly into most broadband modems, and into which ordinary phone handsets can be attached. The MTA performs digital-to-audio and audio-to-digital conversions, and routes the packets to and from the IVP’s equipment. This equipment is quite portable, so a customer can access Movants’ services anywhere in the world that the customer has access to a broadband Internet connection, simply by plugging their MTA into a router or other Ethernet port.¹⁸

Second, Movants’ customers may use “non-native” telephone numbers; that is, numbers not associated with the local calling area usually served by a PSAP.¹⁹ Because PSTN users cannot dial an Internet IP address, Movants typically obtain telephone numbers from regulated tele-

¹⁶ *Id.* at ¶ 79; *Id.* App. B at 47, *to be codified at* 47 C.F.R. § 9.5(b)(2). Movants are complying with, and do not seek a stay of, requirements (5), (6), and (7).

¹⁷ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 at ¶ 3 (2004), (“*Vonage Preemption Order*”).

¹⁸ Rose Decl. ¶¶ 6-7, Grieve Decl. ¶¶ 6-7, Talley Decl. ¶¶ 6-7, Bhatia Decl. ¶¶ 7-8. This is frequently termed “nomadic” VoIP, as opposed to “fixed” VoIP where users cannot move the service on their own. *See Vonage Preemption Order* at ¶ 23-25. Customers can use other CPE as well, including “softphone” software installed directly on laptop computers and native IP phones.

¹⁹ Talley Decl. ¶¶ 8, 14; Grieve Decl. ¶¶ 7, 12; Rose Decl. ¶¶ 7, 12; Bhatia Decl. ¶¶ 8, 16.

phone companies, like other end-users. Rather than being associated with a physical, geographic address on the PSTN, these numbers are associated with an MTA connected to the Internet. The PSTN number is matched to the IP address of the customer's MTA, thereby allowing a PSTN user to communicate with an IVP user. The IVP's customers can be assigned a telephone number from a "non-native" exchange, and VoIP customers take advantage of this capability.²⁰ For example, a customer residing in Washington, DC, historically associated with the 202 area code, can be assigned a number with a Los Angeles "213" area code or a London, UK area code.²¹ Many of the calls carried by Lingo originate outside the U.S.²²

Movants began their efforts to comply with the November 28 deadline immediately after the Commission's *Order* was adopted by investigating what would be required to deploy a nationwide E911 solution.²³ Each of the Movants offers a nomadic service, as described above, and allows customers in one geographic area to use telephone numbers that are associated with distant or non-local geographic areas.²⁴ Thus, a customer could register an address anywhere in the country, and Movants would have to provide E911 service to that address; and be able to deliver E911 calls originating from non-native telephone numbers.

Movants rapidly determined that they did not have the resources, capital or time to create and deploy their own dedicated E911 solution.²⁵ Unlike traditional providers of telecommunications services, Movants were not required to obtain state licenses to operate as carriers, nor were

²⁰ The *Order* notes that this feature is one of the most attractive features of VoIP Service generally. ("one of the central customer benefits of portable interconnected VoIP services is the lack of geographic restrictions." ¶ 57 (citing *Vonage Preemption Order*, 19 FCC Rcd at 22422, ¶¶ 25, 29.)

²¹ Rose Decl. ¶ 7; Talley Decl. ¶ 8; Bhatia Decl. ¶ 8; Grieve Decl. ¶ 7.

²² Bhatia Decl. ¶¶ 8-9.

²³ Rose Decl. ¶ 19, Grieve Decl. ¶ 25, Talley Decl. ¶ 25, Bhatia Decl. ¶ 28.

²⁴ Rose Decl. ¶ 7, Grieve Decl. ¶ 7, Talley Decl. ¶ 8, Bhatia Decl. ¶¶ 8-10.

²⁵ Talley Decl. ¶ 26; Bhatia Decl. ¶ 29; Rose Decl. ¶ 20; Grieve Decl. ¶ 26.

they required to enter into interconnection agreements. As a result, Movants do not have the requisite legal authority to interconnect with selective routers in the Wireline E911 Network.²⁶ Moreover, no CLEC has coverage to more than 60% of the country.²⁷ Even if Movants had the resources and capital to obtain licenses in all 50 states – which they do not – there was not enough time for the Movants to obtain all such licenses and enter into interconnection agreements before November 28.²⁸ Since Movants could not create their own E911 solution that would conform with the *Order*, Movants contacted third-party solution providers including Global Crossing, Intrado, Level 3, MCI, Telefinity and TeleCommunications Systems, Inc.²⁹ Each of these companies offered slightly different services. Specifically, one party's service was limited to updating location information and address verification services and offered no 911 call delivery service.³⁰ Another party could not accommodate nomadic VoIP service nor address non-native telephone numbers.³¹ Another available solution was limited to telephone numbers assigned by the provider and is geographically limited to the provider's service footprint.³² Further, no company in the market offers a solution that will cover the entire United States by November 28, 2005.³³

²⁶ Lightyear Network Solutions, LLC is certified in approximately 40 states. However, the Company lacks the time and resources to use their existing certifications to obtain direct access to the selective routers in order to enable a nomadic VoIP E911 solution.

²⁷ See *Order* at ¶ 38 n.124 (citing Level 3 May 12 Ex Parte at 2, stating that Level 3's 911 VoIP 911 solution is only available in 60% of the United States and only for "native" numbers.)

²⁸ Talley Decl. ¶ 27; Bhatia Decl. ¶ 30; Rose Decl. ¶ 21.

²⁹ Rose Decl. ¶ 17, Grieve Decl. ¶ 17, Talley Decl. ¶ 28.

³⁰ Talley Decl. ¶ 28; Rose Decl. ¶ 22.

³¹ *Id.*

³² *Id.*

³³ Rose Decl. ¶ 24, Grieve Decl. ¶ 30, Talley Decl. ¶¶ 28, 30-31, Bhatia Decl. ¶¶ 32-33, 35.

Due to the proposed solutions and representations made by the third-party solution providers, several of the Movants separately determined to use the same provider, and another Movant used a provider that effectively resells the E911 solution used by the other Movants.³⁴ At least one Movant is obligated to enter into an exclusive arrangement that prohibits the IVP from using a solution offered by a separate third-party provider.³⁵ Even if this vendor does not have a solution in a particular market, the IVP is required to give the vendor 90 days to implement a solution before using a separate third-party solution provider.³⁶ Should the vendor fail to meet the 90-day deadline, Nuvio can use another solution provider, but as soon as its primary vendor deploys a solution in that market, Nuvio must migrate to that solution.³⁷ This prohibits Nuvio from entering into a long term contract with another provider, all of which also require exclusive term commitments, which effectively means that Nuvio is wholly reliant on its currently selected provider for the initial term.³⁸

The Movants' vendors say they will have an E911 solution in compliance with the *Order* by November 28 in most markets within the top 20 Metropolitan Statistical Areas ("MSAs") of the United States.³⁹ This covers only 10% of i2's customers and 12% of Lightyear's customers in the United States.⁴⁰ Moreover, no vendor will contractually commit to having an E911 solution in place that conforms with the *Order* in any market at any time.⁴¹ At this time, Movants do not

³⁴ Rose Decl. ¶ 17, Grieve Decl. ¶ 17, Talley Decl. ¶ 29, Bhatia Decl. ¶ 31.

³⁵ Talley Decl. ¶¶ 34-35.

³⁶ *Id.* ¶ 34.

³⁷ *Id.* ¶ 29.

³⁸ *Id.* ¶ 34-35.

³⁹ Rose Decl. ¶¶ 25, Grieve Decl. ¶¶ 30, Talley Decl. ¶ 30, Bhatia Decl. ¶ 32.

⁴⁰ Rose Decl. ¶ 4; Grieve Decl. ¶ 30. Nuvio's third party solution allows it to serve approximately 30% of its customers. Talley Decl. ¶ 4.

⁴¹ Rose Decl. ¶ 28, Grieve Decl. ¶ 32, Talley Decl. ¶ 33, Bhatia Decl. ¶ 35.

know when or if it will be possible to provide an E911 solution in conformity with the *Order* throughout the entire United States, but their vendors' deployment schedule only projects a solution in 116 of the 922 MSAs in the continental United States by the end of 2005.⁴² The vendor for i2, Nuvio and Lingo previously projected availability of 911 service in an additional 47 MSAs by September 2005, a projection that "has not yet occurred."⁴³ According to this vendor, some parts of the United States will likely never be covered.⁴⁴

Further, Movants do not believe any of the vendors they have contacted will be able to provide full E911 capability for non-native numbers by November 28.⁴⁵ These calls require pseudo-telephone numbers (or "pseudo-ANI" or "p-ANI") that are geographically relevant to be dynamically assigned for purposes of routing the call through the selective router.⁴⁶ The use of pseudo-ANI requires an entity to administer such numbering resources but in certain areas there is no such entity.⁴⁷ In areas where there is no entity to administer the p-ANI, it is highly likely that neither the IVP nor the third party provider will have an E911 solution in place that conforms with all aspects of the *Order* by November 28, 2005 because neither entity will have access to the necessary numbering resources.⁴⁸

The Commission has made clear that IVPs that do not comply with the *Order* will be subject to "swift enforcement action ... including substantial proposed forfeitures and, in the appropriate cases, cease and desist orders and proceedings to revoke any Commission licenses held by

⁴² Talley Decl. ¶ 19, Bhatia Decl. ¶ 35.

⁴³ Talley Decl. ¶ 33.

⁴⁴ Bhatia Decl. ¶ 35.

⁴⁵ Talley Decl. ¶ 30; Bhatia Decl. ¶¶ 32-33, 35.

⁴⁶ Rose Decl. ¶ 12, Grieve Decl. ¶ 12, Talley Decl. ¶ 14, Bhatia Decl. ¶ 16.

⁴⁷ Rose Decl. ¶ 12, Grieve Decl. ¶ 12, Talley Decl. ¶ 14, Bhatia Decl. ¶ 16.

⁴⁸ Rose Decl. ¶ 12, Grieve Decl. ¶ 12, Talley Decl. ¶ 14, Bhatia Decl. ¶ 16.

the [IVPs].”⁴⁹ Movants will then be faced with a dilemma: continue to provide service and face potential enforcement actions, or disconnect customers risking their safety and possibly breaching their contracts.⁵⁰ Some of the Movants would be forced to disconnect nearly 90% of their subscribers, rendering their ability to remain in business doubtful.⁵¹ Those Movants able to remain in business are unlikely later to win back disconnected customers, as those customers will blame Movants for the service interruption and consider their service unreliable.⁵² Further, customers will immediately have to find new communications providers.⁵³ For these reasons, it is highly unlikely that Movants will be able to reclaim any of the customers lost to disconnection.

LEGAL ARGUMENT

The Commission’s standard for staying its own orders pending appellate review is well-established:

In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass’n v FPC*, [259 F.2d 921, 925 (D.C. Cir. 1958)] as modified in *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.* [559 F.2d 841, 843 (D.C. Cir. 1977)]. Under that test, a petitioner must demonstrate that: (1) it is likely to succeed on the merits on appeal; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. [See *Price Cap Performance Review for Local Exchange Carriers*, Order, 10 FCC Rcd. at 11996-97 (“*Price Cap Order*”).] A petitioner must meet each of these tests in order for the Commission to grant a stay.⁵⁴

⁴⁹ Order, at ¶ 51.

⁵⁰ Rose Decl. ¶¶ 31, Grieve Decl. ¶ 34, Talley Decl. ¶¶ 46-47, Bhatia Decl. ¶¶ 36-37, 40.

⁵¹ Grieve Decl. ¶¶ 4, 30 (88%); Rose Decl. ¶ 4 (90%); Talley Decl. ¶¶ 4, 36, 38-39 (70%).

⁵² Talley Decl. ¶ 40; Bhatia Decl. ¶ 44; Rose Decl. ¶¶ 32-33; Grieve Decl. ¶¶ 35-36.

⁵³ Rose Decl. ¶ 33, Grieve Decl. ¶ 47, Talley Decl. ¶ 40, Bhatia Decl. ¶ 44.

⁵⁴ *Access Charge Reform; Price Cap Performance review for Local Exchange Carriers; Low Volume Long Distance Users; Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd. 13191, ¶ 4 (2000) (“Access Charge Reform”) (footnote 9 omitted, other footnotes inserted in brackets).

The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on the other factors is particularly strong. *Price Cap Order*, 10 FCC Rcd. 11991, 11997 n.30 (1995) ... (citing *Expanded Interconnection with Local Telephone Company Facilities*, Order, 8 FCC Rcd. 123, 124 n.10 (1992)).⁵⁵

As demonstrated below, Movants' stay request satisfies each of these criteria.

I. THE COMMISSION'S RULES ARE LIKELY TO BE OVERTURNED ON APPEAL

Appellate review of FCC rule-making "is governed by the judicial review provision of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706."⁵⁶ Under the APA, the court will "hold unlawful or set aside agency action, findings, and conclusions that are found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law ... [or] unsupported by substantial evidence.'"⁵⁷ Although review of agency rulemaking is deferential, the agency must articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."⁵⁸

The *Order* is arbitrary and capricious because the agency's decision runs "counter to the evidence" in the record, and the Commission "entirely failed to consider ... important aspect[s] of the problem" IVPs will face in complying with the Commission's mandate of 100% nationwide coverage within 120 days.⁵⁹ The *Order* is also inconsistent with past Commission decisions regarding implementation of E911 capabilities by other service providers, and the Commission

⁵⁵ *Id.* n 9.

⁵⁶ *Prometheus Radio v. FCC*, 373 F.3d 372, 425 (3d Cir. 2004).

⁵⁷ *Id.* (quoting 47 U.S.C. § 706(2)(a), (e)).

⁵⁸ *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962)).

⁵⁹ See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

failed to provide a reasoned explanation for its change in policy. For these reasons, Movants likely will prevail on the merits.

A. The Rules Cannot be Reconciled with Record Evidence of Insurmountable Obstacles to Implementation

The record evidence shows that technological and practical obstacles make complete nationwide compliance with the Commission's order within 120 days impossible for Movants. Tellingly, there is little, if any, evidence suggesting compliance would be possible. Rather, the Commission imposed obligations despite overwhelming evidence that VoIP providers in general, and providers of nomadic services in particular, could not possibly comply within 120 days.⁶⁰

The *Order* directs IVPs to (a) route every customer's 911 calls to the appropriate selective router, regardless of whether the customer's telephone number is local to that router; (b) allow any VoIP customer to register a new service address at any time, which requires the IVP to be able to route 911 calls from any address a customer might register; and (c) deliver all 911 calls to selective routers over "dedicated" facilities that largely did not exist at the time of the *Order* and that in most cases must be provided by incumbent local exchange carriers ("ILECs"). These conditions are impossible to meet because (1) many VoIP customers use non-native telephone numbers, which most selective routers cannot recognize without extensive software upgrades; (2) "nomadic" users can connect to their VoIP service from any broadband Internet connection, anywhere in the world; and (3) the Commission failed to impose any obligation on ILECs to permit connections to selective routers corresponding to the IVPs' obligation to obtain

⁶⁰ See *Qwest Ex Parte* at 1-2 (filed May 12, 2005); *Level 3 Communications, Inc. Ex Parte* at 3 (filed May 12, 2005); *TeleCommunication Systems, Inc. ("TCS"), Ex Parte, Attachment* at 11-12 (filed May 12, 2005); See also *VON Coalition Ex Parte* at 8 (filed May 12, 2005); *Vonage Ex Parte* at 2-4 (filed May 11, 2005); *Ex Parte Meeting Notice of AT&T* at 2 (filed May 9, 2005); *Nuvio Corporation ("Nuvio") Ex Parte* at 3-4 (filed May 12, 2005).

those connections. In short, the “[c]onditions imposed by [the] order are ... unreasonable by virtue of being impossible to meet.”⁶¹

The Commission made no meaningful analysis of whether compliance with its dictates by providers of nomadic services using non-native telephone numbers was feasible, or consistent with the public interest. Although the Commission contended that its rules were necessary to protect public safety, its failure to consider these issues undermines its conclusion. The rules it adopted will require IVPs to make extensive investments in facilities in places where they have no customers today, and may never have customers in the future. The Commission failed to weigh the economic impact of its requirements against the remote and uncertain potential for minor, incremental improvements in public safety.

The record demonstrates that a complete E911 solution that encompasses “non native” and “nomadic” VoIP services is not currently “technically or operationally feasible.”⁶² Where IVPs currently provide 911 service they do so only for “fixed” VoIP,⁶³ or they either do not deliver 911 service directly to the emergency operators at the 911 center;⁶⁴ or their service is limited to certain markets in the United States,⁶⁵ or service is provided with the caveat that the user should not move the service.⁶⁶ Parties advised the Commission that if compliance were required

⁶¹ *D.C. Transit Sys., Inc. v. Washington Metropolitan Area Transit Comm’n*, 466 F.2d 394, 402 (D.C. Cir.), *cert. denied*, 409 U.S. 1086 (1972) (“Impossible requirements imposed by an agency are perforce unreasonable”).

⁶² See Level 3 *Ex Parte* at 2-3 (filed May 12, 2005); Qwest *Ex Parte* at 1-2 (filed April 12, 2005) (VoIP E911 trial in King County, Seattle, Washington “was not successful due to problematic technical issues”); Verizon Communications, Inc. (“Verizon”) *Ex Parte* at 1-2 (filed May 11, 2005).

⁶³ Level 3 May 12 *Ex Parte* at 2.

⁶⁴ Verizon May 11 *Ex Parte* at 2-3.

⁶⁵ See *Order* at ¶ 38 n.124 (citing Level 3 May 12 *Ex Parte* at 2, stating that Level 3’s 911 VoIP 911 solution is only available in 60% of the United States and only for “native” numbers.)

⁶⁶ See Comcast Corporation, Inc. (“Comcast”) *Ex Parte*, at 2 (filed May 12, 2005).

where “access does not exist today it would be tantamount to ordering the discontinuance of service to existing customers” that could not be served using the limited VoIP E911 solutions on the market.⁶⁷

The *Order* further fails to consider the barriers to obtaining dedicated connections to all selective routers nationwide. The Commission suggested that IVPs could satisfy this requirement by interconnecting “indirectly” through CLECs or other carriers that already have direct connections to selective routers (*Order*, ¶ 38), but was well aware that no CLEC or combination of CLECs can provide 100% nationwide coverage as is required for providers of nomadic service.⁶⁸ It also suggested that IVPs could “interconnect directly with the Wireline E911 network,” (*Order*, ¶ 38) but did not consider either the cost of such interconnection or the time required to implement it. It did not even require ILECs to provide the interconnection. It speculated that, because some ILECs may voluntarily permit interconnection in some situations, others would likely follow; but it offered no remedy to an IVP who is unable to obtain interconnection other than promising to “monitor these efforts....” *Order*, ¶ 40.

While the Wireline E911 network that IVPs must use to deliver 911 calls is controlled by the ILECs, the incumbents have typically resisted making E911 network elements available directly to VoIP providers. ILECs do make some E911 network elements available to CLECs, but some access to some elements is not sufficient to enable full nationwide compliance for nomadic

⁶⁷ AT&T May 9 *Ex Parte*, at 2.

⁶⁸ Vonage Holdings Corp. “(Vonage)” *Ex Parte*, at. 3-5 (filed May 9, 2005) (FCC’s data shows that 21% of the zip codes lack presence of a CLEC and another 25% only have 1 or 2 CLECs). According to Level 3, its coverage is limited to approximately 67% of the United States and it provides neither non-native nor nomadic E911. Level 3 *Ex Parte* at 2 (filed May 12, 2005). Nor would it be practicable for any CLEC to expand its network to achieve 100% coverage within 120 days. Level 3 *Ex Parte* at 5 (filed May 13, 2005). *See also* Vonage *Ex Parte* at 2 (filed May 5, 2005) and at 3-5 (filed May 9, 2005).

services.⁶⁹ Access to the ILEC E911 infrastructure, even for CLECs that have legal right to such access,⁷⁰ is fraught with complication and takes considerable time.⁷¹ Third party vendors that supply 911 solutions “need to establish points of presence in every LATA in the country ... [and] these vendors are still developing their deployment plans and do not have firm schedules for implementing this solution.”⁷²

Further, even if the Commission’s expectation of eventual nationwide 911 coverage were reasonable, it had no rational basis for concluding that this could be achieved within 120 days. This “aggressively short” timetable ignored overwhelming and undisputed evidence in the record that 120 days was insufficient.⁷³ The Commission offered no specific justification for the 120-day compliance period.⁷⁴ For all that appears in the *Order*, the number “120” may have been picked out of a hat.

Even if CLECs could provide turn-key nationwide 911 solutions to IVPs, which none does, the IVPs would still have to enter into agreements with CLECs to use these services and also turn up all the trunking and signaling facilities needed to implement them. The time it will

⁶⁹ Voice On The Net Coalition (“VON Coalition”) *Ex Parte* at 5 (filed May 12, 2005).

⁷⁰ See Level 3 *Ex Parte* at 5 (filed May 12, 2005) requesting that the FCC not require section 252 interconnection agreements for CLECs to obtain access from ILECs.

⁷¹ Vonage *Ex Parte*, p. 10-11 (filed May 9, 2005) (citing specific timeframes); Level 3 *ex parte supra* n.22 (“the process of negotiating an interconnection agreement by itself will preclude expanding E911 footprints beyond current areas within 120-day implementation period.”)

⁷² Verizon *Ex Parte* at 3 (filed May 11, 2005).

⁷³ See BellSouth Telecommunications, Inc. (“BellSouth”) *Ex Parte*, at 1 (filed May 12, 2005) (“It is unrealistic to expect” that the challenges of nomadic VoIP “will be fully implemented ... by the end of the year.”) National Emergency Number Association (“NENA”) *Ex Parte* at 4-5 (filed May 6, 2005) (“Full availability” of NENA standard access could require another 6-12 months even if fast tracked” in addition to the 120 days required in the *Order*.) Other parties, including incumbent LECs with whom IVPs compete, suggest an 18-month timetable would be more realistic. See Qwest May 12 *Ex Parte* at 1-2; EarthLink, Inc. (“Earthlink”) *Ex Parte* at 1-2 (filed May 12, 2005).

⁷⁴ The Commission asserted that an “aggressively short” deadline was required by the risk to public safety, but cited no evidence that compliance within 120 days was even theoretically feasible, much less practicable. *Order*, ¶ 37.

take IVPs and CLECs to enter into the many contractual relationships that are required to implement nationwide E911 coverage will easily exceed the narrow window provided by the Commission.⁷⁵ Nor could IVPs reasonably be expected to obtain ubiquitous direct interconnection within 120 days.⁷⁶

B. The Order is an Unexplained Departure from the Commission's Long-Standing Policy for Implementing E911 Regulations

The issues posed by the coordination of new communications technologies with the existing 911 public safety network are not novel. The Commission has wrestled with similar issues in the context of wireless and other innovative technologies since 1994. Its decisions on those issues established policy guidelines from which it has now departed, without any reasoned explanation and without even considering many factors that were determinative in crafting the policy in the first place. “[W]hen an agency reverses its “former views” it is “obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”⁷⁷ Because the *Order* fails to supply such a justification, its departure from a decade-long policy guiding E911 implementation cannot survive review on the merits.

In determining the pace and scope of E911 implementation on nascent technologies, the Commission consistently has sought to balance a number of interrelated but competing objectives. It has consistently avoided imposing “specific regulatory requirements” on nascent ser-

⁷⁵ See, e.g., US Datanet, Inc. (“US Datanet”) *Ex Parte*, at 2 (filed May 12, 2005).

⁷⁶ See *Vonage Ex Parte* at 10-11 (filed May 9, 2005) (“while FCC requirements may be imposed on Vonage – Vonage will be completely dependent on the timely and voluntary cooperation of competitors or unaffiliated third parties with whom Vonage may have no contractual relationship”; “Vonage will also need time to reach commercial contracts with each of the carriers that ultimately provision the pANIs and emergency service access”).

⁷⁷ *Prometheus*, 373 F.3d at 425, citing *State Farm*, 463 U.S. at 41-42; see also *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 589 (2d Cir. 1994) citing *State Farm* (“When an agency has committed itself to a settled course of behavior, a presumption in favor of that course arises”).

vices that “may impede the development of the service in ways that might reduce its ability to meet public safety needs.”⁷⁸ While the Commission promotes the availability of 911 and E911 services to the public,⁷⁹ it has insisted that “any rules adopted must provide sufficient flexibility to foster the development of alternative methods and technological innovation.”⁸⁰ Its rules must therefore “carefully balance the need to achieve compatibility and the need to ensure that equipment owners and manufacturers are not unduly burdened.” *Id.* Consistent with this principle, the Commission weighs the impact of proposed rules on the “commercial success” of new services.⁸¹ It acknowledges that overly prescriptive E911 requirements “would be inconsistent with the Commission’s policy to promote the advancement of new technologies.”⁸² The Commission has found that the application of 911 and E911 requirements to new technologies can be a daunting

⁷⁸ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 18676, 18718 ¶ 83 (1996) (“E911 Report and Order”).

⁷⁹ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Notice of Proposed Rulemaking, 9 FCC Rcd. 6170, 6171-2 ¶ 7 (1994) (“E911 Proposed Rules”).

⁸⁰ *Id.* at 6174, ¶ 21.

⁸¹ *Id.* at 6186 ¶ 34.

⁸² *Revision of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling System; Amendments of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS)*, Memorandum of Understanding and Arrangements; *Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission’s Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 25340, at ¶ 62 (2003) (“E911 Scope Order”).

[I]n deciding whether to exercise our regulatory authority [over 9-1-1] in the context of IP-enabled services, we are mindful that development and deployment of these services is in its early stages, that these services are fast-changing and likely to evolve in ways that we cannot anticipate, and that imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution.

Order ¶ 53.

task, and has given providers a reasonable period to phase in the offering of 911 and E911 services in a manner that is technically and economically feasible.⁸³

Consistent with this public policy, the Commission has refrained from imposing E911 obligations on Multi-Line Telephone Systems (“MLTS”) for more than a decade,⁸⁴ and endorsed an approach proposed by NENA that reflects the careful balance between technological innovation and protecting public safety.⁸⁵ The Commission found the NENA proposal “well suited” to guide states and localities because it “allows for a flexible initial deployment schedule.”⁸⁶ Significantly, NENA proposed exempting IP telephones and IP based MLTS until two years after the FCC addressed E911 implementation.⁸⁷ It also proposed a 7-year implementation schedule for existing MLTS,⁸⁸ and extending protection from liability to MLTS providers akin to existing wireline and wireless carrier exemptions.⁸⁹

The *Order*’s inconsistency with stated policy is particularly clear in the case of MLTS provided using VoIP technology. Nuvio, for instance, provides IP-based PBX services, and ap-

⁸³ See *IP-Enabled NPRM*, ¶ 52 n. 160 (“recognizing the challenges of implementation of E911 requirements the Commission adopted a phased implementation plan;” *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver of Deadlines for Implementation of Phase II E911 of Key Communications, LLC and Keystone Wireless, LLC*, CC Docket 94-102, Order, FCC 05-181 at ¶ 4 (“Commission’s rules ... establish phased-in schedules for CMRS E911 compliance.”))

⁸⁴ *E911 Scope Order*, n.170. MLTS refers to arrangements where a customer uses a “Private Branch Exchange (“PBX”), a switch that is dedicated to serving its internal and external communications needs. Typically, large sophisticated customers use a PBX to allow four digit dialing among its personnel. The PBX is typically connected to the PSTN via trunks between the customer’s PBX and the LEC switch. MLTS—unlike mobile wireless, mobile satellite, and VoIP services—is not a technological innovation. PBXs have been in use for decades, but the industry had no means of allowing E911 responders to identify the location of a specific caller within a large organization served by a PBX.

⁸⁵ See *E911 Scope Order*, ¶ 58.

⁸⁶ *Id.* ¶ 59.

⁸⁷ Comments of NENA, CC Docket 94-102 Ex. C Model Legislation at 11, (filed July 24, 2001).

⁸⁸ *Id.* at 12.

⁸⁹ *Id.*

parently is subject to § 9.5 of the rules even though other providers of MLTS have no obligation to route 911 calls. It is arbitrary for the Commission to apply one set of rules to circuit switched MLTS but a wholly different set to the same service provided over a different technology.

Additionally, the Commission did not impose an E911 requirement on mobile wireless services until the market was relatively mature with broad nation-wide acceptance. In 1996, when the Commission imposed its E911 rules on CMRS providers, there were already *34 million* CMRS subscribers in the U.S.⁹⁰ CMRS providers now serve 184.7 million customers,⁹¹ and wireless is a more widespread substitute for primary line service than VoIP.⁹² Even as wireless service has emerged as a potent primary line replacement service, the Commission has afforded CMRS providers over a decade to implement 911 and E911. For CMRS providers, the Commission recognized that in certain instances the “expense and technical difficulty” of “immediate compliance” with its E911 rules were unwarranted.⁹³ It allowed carriers to implement the service in phases and provided what at the time appeared to be aggressive but reasonable periods for implementation of each phase.⁹⁴ As the CMRS carriers faced technical difficulties during implementation, the Commission routinely permitted additional time, and full implementation of wireless E911 location technology will not take place until the end of 2005, and even then, only

⁹⁰ Vonage May 9 *Ex Parte* at p. 9 (citing Cellular Telecommunications Industry Assn., Wireless Industry Indices Year End 2003 Results (May 2004)).

⁹¹ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT 05-71, Tenth Report, FCC 05-173 ¶¶ 5, 161 (rel. Sep. 30, 2005) (“*2005 Wireless Competition Report*”).

⁹² *Id.* at ¶ 197 (finding that “consumers appear increasingly to choose wireless service over traditional wireline service,” and that “one-third of all households receive more than half of their calls on wireless phones, with 9 percent receiving almost all their calls wirelessly.”)

⁹³ *E911 Scope Order* at ¶ 37.

⁹⁴ *See Order* ¶ 10.

where the PSAPs are prepared to receive ALI and ANI information.⁹⁵ The CMRS industry, whose service functions as a primary line replacement, continues to seek extensions of the Commission's decade long E911 timetable, claiming that compliance by December 2005 is not possible.⁹⁶ The Commission has not explained either how, or why, it is reasonable to direct the VoIP industry, which serves only a few million customers,⁹⁷ to do in four months what the CMRS industry has not achieved in over ten years while becoming a primary line replacement for an increasing number of customers.⁹⁸

The Commission also has refrained in past cases from imposing an E911 requirement on new services where "technical difficulties" interfere with "implementing both basic and enhanced 911."⁹⁹ For instance, the Commission acknowledged that Mobile Satellite Service ("MSS") providers cannot easily implement 911 solutions, allowed MSS providers to use call centers to deliver 911 calls to the appropriate emergency authority, and granted them a full year

⁹⁵ See, e.g., *Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, 17 FCC Rcd. 14841 (2002); *Request for Waiver by Cingular Wireless LLC*, 16 FCC Rcd. 18305 (2001); *Request for Waiver by Verizon Wireless*, 16 FCC Rcd. 18364 (2001); *Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc.*, 16 FCC Rcd. 18277 (2002); *Request for Waiver by AT&T Wireless Services, Inc.*, 16 FCC Rcd. 18253 (2001); *Request for Waiver by Sprint Spectrum L.P. d/b/a Sprint PCS*, 16 FCC Rcd. 18330, 18331 (2001).

⁹⁶ *Wireless Telecommunications Bureau Requests Comment On Verizon Wireless Request For Limited Waiver Of The December 31, 2005 Deadline To Achieve Ninety-Five Percent Penetration Of Location-Capable Handsets Among Its Subscribers*, Public Notice, WT Docket No. 05-31, DA 05-2760 (rel. Oct 21, 2005); *Wireless Telecommunications Bureau Requests Comment On Nextel Partners Petition For Limited Waiver Of The December 31, 2005 Deadline To Achieve Ninety-Five Percent Penetration Of Location-Capable Handsets Among Its Subscribers*, Public Notice, WT Docket 05-302, DA-05-2761 (rel. Oct 21, 2005).

⁹⁷ Vonage May 9 *Ex Parte* at p. 9-10 citing Matthew Fordahl, *Vonage to get Internet Phone Competition* (USA Today April 13, 2005) (http://www.usatoday.com/tech/techinvestor/corporatenews/2005-04-13-voip-competition_x.htm (visited May 6, 2005); Ken Belson, *Psst! Want Internet Phone Service* (New York Times April 28, 2005) (Sec. C, p. 1, Col. 2) (available for a fee at: <http://query.nytimes.com/gst/abstract.html?res=F40713FA3B550C7B8EDDAD0894DD404482>).

⁹⁸ See 2005 Wireless Competition Report ¶¶ 5, 161.

⁹⁹ *E911 Scope Order* ¶ 21.